Last page of docket
SHOW

PROCEEDINGS AND ORDERS

DATE: [10/11/89]

STATUS: [ ]

CASE NBR: [89105327] CSH
SHORT TITLE: [Schiro, Thomas A.]
VERSUS [Indiana] DATE DOCKETED: [041089]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 10 1989		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Aug 24 1989		Brief of respondent Indiana in opposition filed.
Aug 31 1989		DISTRIBUTED. September 25, 1989
Sep 29 1989		REDISTRIBUTED. October 6, 1989
Oct 10 1989		Petition DENIED. Opinion by Justice Stevens respecting the denial of the petition for a writ of certiorari. (Detached opinion.) Brennan and Marshall dissenting: Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

****

89-5327

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 19___

THOMAS N. SCHIRO,

Appellant,

v.

STATE OF INDIANA,

Appellee.

PETITION FOR A WRIT OF
CERTIORARI ON APPEAL FROM THE
SUPREME COURT OF INDIANA

OWEN M. MULLIN
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QUESTION PRESENTED FOR REVIEW

Whether the "de facto" finding of not guilty of murder herein precludes the impostition of the Death Penalty.

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NO. _____

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THOMAS N. SCHIRO,

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STATE OF INDIANA,

Appellee.

PETITION FOR A WRIT OF
CERTIORARI ON APPEAL FROM THE
SUPREME COURT OF INDIANA

The Petitioner, Thomas N. Schiro, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Indiana, the State Court of last resort.

OPINIONS BELOW

Thomas N. Schiro was convicted of felony murder on September 12, 1981. The jury recommended that the death penalty not be imposed. The trial court overruled that recommendation and ordered the death sentence for Petitioner. The Supreme Court of Indiana affirmed the trial court on direct appeal. Schiro v. State (1983) 451 N.E.2d 1047. This court denied a Writ of Certiorari therefrom on Novebmer 28, 1983. Schiro v. Indiana (1983) 464 U.S. 1003, 104 S.CT. 510, 78 L.Ed2d 699. Petitioner initiated a collateral attack via Post-Conviction Relief. The Trial Court denied Post-Conviction Relief on

May 29, 1984. The Supreme Court of Indiana affirmed the trial court's denial of Post-Conviction Relief on June 28, 1985. Schiro v. State (1985) 479 N.E.2d 556. This Court denied a Writ of Certiorari on February 24, 1986. Schiro v. Indiana (1986) 475 U.S.1036, 106 S.Ct. 1247, 89 L.Ed2d 355.

Petitioner instituted a habeas corpus proceeding in the U.S. District Court, Northern District of Indiana, South Bend Division. The U.S. District Court remanded the cause to state court to provide for exhaustion of all available state remedies as required for federal habeas corpus proceedings.

Subsequently, on March 5, 1987, Petitioner filed the instant action seeking post-conviction relief. The trial court denied Petitioner's Post-Conviction Relief. The Supreme Court of Indiana affirmed the trial court's denial of Post-Conviction Relief on February 8, 1989. Schiro v. State (1989) 533 N.E.2d 1201.

JURISDICTION

The Supreme Court of Indiana's decision is a "final judgment . . . rendered by the highest court of a State in which a decision could be had . . ."pursuant to the provisions of 28 U.S.C. §1257.

The Jurisdiction of the Court is invoked under the provisions of 289 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

The Fifth Amendment to the U.S. Constitution provides in pertinent part ". . . nor shall any person be subject for the the same offense to be twice put in jeopardy of or limb."

The Sixth Amendment to the U.S. Constitution provides in pertinent part ". . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Pursuant to Federal Court Order, Appellant filed his second Petition for Post-Conviction Relief on March 5, 1987. Appellant simultaenously filed his Verified Motion for Change of Venue from Judge and an Affidavit in support thereof.

The State filed its Motion To Dismiss Petition for Post-Conviction Relief in response on March 9, 1987 A hearing was held on the State's Motion To Dismiss on July 16, 1987

The Honorable John G. Baker, Special Judge, partially overruled the

State's Motion to Dismiss (R. 51, 156). An evidentiary hearing regarding Defendant's Petition for Post Conviction Relief was had on October 30, 1987 (R. 166-256). The parties filed briefs in support of their allegations.

The trial court entered an order denying Petitioner's PCR. (See Appendix B.) Petitioner filed his Motion To Correct Errors

on March 15, 1988 (R. 001-009). The Court denied the Motion to Correct Errors on the 19th day of April, 1988. The Trial Court, by the Trial Judge, the Honorable Samuel R. Rosen, issued an "Order Specifying Time and Date for Execution of Death Sentence" on April 20, 1988 Appellant filed his Praecipe on May 19, 1988. Defendant filed a Petition For Stay Of Execution which was denied by the Trial Court on July 15, 1988. The Record was filed on July 18, 1988. Defendant filed his Verified Petition For Stay Of Execution with the Supreme Court of Indiana on July 19, 1988. The Stay was granted.

ARGUMENT

The jury was charged in all courts and returned but a single verdict, namely guilty on Count II, Felony Murder. As to the other courts, the verdict was entirely silent in regard to guilty or innocense of petitioner. The law requires that the jury verdict be deemed the legal equivalent of verdicts that Petitioner is not guilty of the felonies charged in Counts II and III. The silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable reject of the State's claim the

Petitioner deserves to die because he had the intentional state of mind required by the Indiana Statutory scheme.

That verdict acquitted Plaintiff of that condition which was necessary to impose the death penalty under this charge.

The State was then barred by the Double Jeopardy Clause from continuing to seek the Death Penalty upon Petitioner's acquittal on Count I. Bullington v. Missouri (1980) 451 U.S. 430, 101 S.Ct. 1852, 62 L.Ed.2d 270.

The jury's rejection of State's contention that Petitioner possessed the required intentional state of mind is further evinced by their unani-

mously recommendation against the imposition of the Death Penalty.

The State is required to prove beyond a reasonable doubt that the killing was intentional to impose the death penalty. The jury was given a chance to find Petitioner guilty of either murder or felony murder (as well as all the choices of lesser-included offenses, insanity, not guilty). The jury did not find Petitioner guilty of murder. Thus, they did not find that he knowingly or intentionally killed. Rather, they found him guilty of felony murder, that is he killed (with whatever state of mind) during the commission of rape. The statutory aggravating fac-

tor is that he "committed the rape by intentionally killing the victim while committing the rape." Intentionality was apparently rejected by the jury. Therefore, there seems to be a double indication that the jury did not find that the accused intentionally killed. First, because Petitioner was not found guilty of felony murder, and second, that the jury did not recommend the death sentence.

Your Petitioner also contends that he was denied effective assistance of counsel at both the trial and appellate stages of his proceedings in failing to raise the issue prior to this proceeding. Counsel's inaction violated the prin-

cipals established in Strickland v. Washington (1984), 466 U.S. 668 , 104 S.Ct. 2052, 80 L.Ed.2d 674; a result of which deprived your Petitioner fundamental fairness and due process of law.

CONCLUSION

Therefore Appellant is entitled to a reversal of the Supreme Court of Indaina's affirmation of the denial for PCR.

Respectfully submitted,

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APPENDIX "A"

THOMAS N. SCHIRO,

Appellant (Defendant below)

v.

STATE OF INDIANA,

Appellee (Plaintiff below)

No. 07S00-8807-PC-656

Supreme Court of Indiana

February 8, 1989

Linley E. Pearson, Atty. Gen.,

Joseph N. Stevenson, Deputy Atty.

Gen., Indianapolis for Appellant.

Alex R. Voils, Jr.

110 N. Delaware Street

Indianapolis, IN 46204

PIVARNICK, J.

This direct appeal arises from a denial of post-donviction relif. The history of this cause in this court is extensive. On September 12, 1981, Defendant Schiro was found guilty of the offense of murder while committing, and attempting to commit, the crime of rape. The trial court entered judgment of conviction on the jury's verdict. The jury recommended that the death penalty not be imposed but the trial court overruled that recommendation and ordered the death sentence for Schiro. This court affirmed the trial court's judgment. Schiro v. State (1983), Ind., 451 N.E.2d 1047. On November 28, 1983,

the United States Supreme Court denied Schiro's writ of certiorari to vacate the death penalty. Schiro v. Indiana (1198), 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699. On May 11, 1984, Schiro filed an amended petition for post-conviction relief which was denied by Special Judge James M. Dixon on May 29, 1984. This court affirmed the trial court's denial of post-conviction relief on June 28, 1985. Schiro v. State (1985), Ind., 479 N.E.2d 556. On February 24, 1986, the United States Supreme Court denied Schiro's writ of certiori to vacate the death sentence. Schiro v. Indiana (1986), 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355.

Thereafter Schiro instituted a petition for writ pf jabeas corpus in the United States District Court Northern District of Indiana, South Bend Division. Judge Allen Sharpe remanded to the state court, allowing Schiro to exhaust all available state remedies as required for federal habeas corpus proceedings pursuant to 28 U.S.C. §2254(b); Ex Parte Hawk (1944), 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed.2d 572. Subsequently, on March 5, 1987, Schiro filed the instant action, his second post-conviction relief petition. He filed the timely motion for change of venue from the trial court and Monroe County Circuit Judge John Baker was appointed special

judge, qualified, and assumed jurisdiciton on march 25, 1987. Schiro's petition for post-conviction relief was denied by Judge Baker.

The issues raised in Schiro's direct appeal to this court are:

1. trial court error in dismissing four allegations of error based on a finding they were res judicata or waived as availabel but not taken in direct appeal at the original post-conviction relief petition;
2. ineffective representation of counsel at trial, in the direct appeal, and in the first post-convictionnrelief

petition;

3. the jury's guilty verdict on felony murder was a conclusive finding of lack of intent such that a possible death sentence was foreclosed; and

4. accumulated error on all above issues which amounts to prejudice warranting reversal.

The post-conviction petitioner bears the burden or establishing the grounds for relief by a preponderance of the evidence. Rule P.C. 1 §5. The PC 1 hearing judge is the sole judge of the evidence and the credibility of the witnesses. Popplewell v. State (1981), Ind., 428 N.E.2d 15, 16. A

petitioner who has been denied PC 1 relief is in the position of one who has received a negative judgment; he will not obtain a reversal unless the evidence on this point is undisputed and leads inevitably to a conclusion opposite to that of the trial court. To prevail on a claim of ineffectiveness of counsel, a petitioner must satisfy both sides of a two-prong test. He must prove counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. The he must prove that such substandard performance was so prejudicial a sto have deprived him of a fair trial. A fair trial is denied when the conviction or

sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 reh. denied (1984), 467 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, reh. denied (1984), 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed. 2d 864; Lawrence v. State (1984), Ind., 464 N.E.2d 1291.

I

Schiro claims it was erroneous to dismiss four sections of his petition which alleged: a) failure of the statute to procide guidelines for consideration of the jury's recommendation and for appellate review of sentences: b) error in admitting a

search warrant, affidavit, and physical items: c) error in excluding a handwritten document; and d) error in providing verdict forms. The trial court found these matters were either res judicata or waived as available but not taken in direct appeal or the original PCR petition.

The purpose of the post-conviction relief process is to raise issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time. Where an item was available to the defendant on direct appeal but not pursued, it is waived State (1988), Ind., 521 N.E.2d 336, 337. An issue which is raised and

determined adverse to petitioner's position res judicata.

Ingram v. State (1987), Ind., 508 N.E.2d 805, 807. In Schiro's direct appeal this court spoke directly of guidelines for considering the jury's recommendation and for appellate review of sentences. Our discussion included the standard of review of death sentences where the court's judgment is contrary to the the [sic] jury's recommendation, the degree of conclusiveness regarding a jury recommendation of leniency, double jeopardy, where both the jury and the judge consider the imposition of the death penalty where their views are in conflict, and the finiding that the

judge independently considers the same facts on the same standardssas the jury. Schiro, 451 N.E.2d at 1054=1058. Questions of legality of the search warrant, affidavit, and seizure of physical items were fully discussed and disposed of on direct appeal. Schiro's contention concerning the failure of the trial court to admit as evidence a certain handwritten document was fully presented and disposed of in the opinion on direct appeal. This court noted the document was given to a witness by a third party who said Schiro wrote it. The witness did not authenticate the document through knowledge of handwriting or presence at its

penning, or any other accepted basis to authenticate a piece of handwriting. The only basis he had to velieve the document was the out-of-court declaration of the person who gave it to him. We upheld the trial court's finidng an insufficient foundation existed to permit admission of the document.

Finally, the direct appeal opinion considered and disposed of, adverse to Schiro, his contention he was harmed by lack of some necessary verdict forms. The entire record of the trial and the original PCR petition were put into eveidence in the instant cause. The trial court had the ability to read the opinion and

compare issues, and the power to dismiss these issues disposed of in this court's prior proceedints. The trial court properly found all four issues were so disposed and there was no error in dismissing them as res judicata.

II

Schiro claims in the instant cause there were several instances of inadequate assistance of counsel at the trial level and that subsequent counsel were deficient in no raising these issues on direct appeal or original post-conviction action. The state responds Schiro was not entitled to raise these issues in a subsequent post-conviction petition and moreover,

when examined, these allegations fail to show prejudice or performance below the norms of professional representation. Schiro claims there were serious matters he brought to his attorney's attention before and during trial and trial counsel brushed them of and failed to raise them. The record shows that after all these alleged events, when asked at the end of trial if he was satisfied with his representation, Schiro responded in the positive. He then accepted the same lawyer to prosecute his appeal. He now says counsel failed to present certain issues he wanted raised on appeal. However, when the time came to present his original post-

conviction petition, Schiro failed to allege even one of these trial or appellate level matters.

The Court of Appeals recently stated in Alston v. State (1988), Ind.App., 521 N.E.2d 1331, 1335, that they would not "take a step backward and create a new vehicle by which a defendant could use a PCR to attack a previous PCR on the grounds of incompetency of counsel in that PCR hearing, and then use yet a third PCR to attack the competency of counsel of the second PCR and so on in perpetuity." In Lane v. State (1988), Ind., 521 N.E.2d 947, this court noted that ineffective assistance of trial counsel would have been an issue

available in the post-conviction petition. "Lane's allegation of ineffective assistance is clearly an attempt to circumvent Rule PC, 1, §8, in order to present eveidence on issues that had been waived." We stated further, "Lane cannot evade PC Rule 1, §8, just by tuping the words 'ineffective assistance of counsel'. "Id. 521 N.E.2d at 949.

If a petitioner is to prevail on a claim of ineffectiveness of counsel he must show he was denied a fair trial when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. Strickland, 466 U.S..at 686; Lawrence, 464 N.E.2d at

1294. To meet this burden, a petitioner must overcome by strong and convincing evidence a presumption that counsel has prepared and executed his client's defense effectively. Williams v. State (1987), Ind., 508 N.E.2d 1264, 1266-1267. The question is factually oriented. This court does not speculate about what may have been the most advantageous strategy. Isolated bad tactics or inexperience do not necessarily amount to ineffective assistance of counsel. McChristion v. State((1987) Ind. 511 N.E.2d 297,300.

(A)

In the second PC hearing, Schiro claims he told his counsel facts which

should have been used in his defense but were note. He claimed there was evidence the victim consented to the sexual encounters and this could have been proved by checking with bartenders and clerks at bars. He further claimed Mary Lee, his girlfriend, told him she was coerced into her testimony which included his admission to, and description of, the crimes committed upon her. However, Schiro never gave the names of the establishments he and the victim allegedly visited, or identified anyone in any of those establishemtns who could verify his story. Further, Mary Lee appeared as a witness attempting to help him. She recounted nothing of what Schiro told

her which he had not himself told other psychiatric expert witnesses in a thirty-page confession that was referred to as an "autobiography."

Schiro claimed insanity as his defense at trial. The claims he presently makes regarding the probative value of the evidence he allegedly gave his lawyer, are totally inconsistent with the insanity defense and all other evidence in the case. Psychiatric tetimony at trial showed that Schiro was a manipulative and incredible individual; the trial court was therefore justified in treating his assertions as questionable and unsubstantiated. There was ample evidence justifying the trial court's

deciding the credibility issue, and we find no reason to disturb it. Furthermore, even if we assume arquendo that Schiro did bring these matterssto his counsel's attention, it was a rational strategy decision to not develop two unpromising and essentially useless leads which could be more damaging than helpful to Schiro.

(B)

Schiro also claims ineffective assistance in counsel's failre to seequester the jury. Counsel was under no duty to request sequestration in a capital case and petitioner must show prejudice bu failure to move for it. Burris v. State (1984) Ind., 465 N.E.2d 171, 193, cert. denied, 469

U.S. 1132, 105 S.Ct. 816, 83 L.Ed.2d 809. To support his contention, Schiro presented a few newspaper clippings showing regional newspapers reported the trial. Included were articles about the jury's final recommendation and the judge's final sentence, though these reporrts obviously did not affect the jury during its deliberations. He located seven jurors but did not present any evidence that any juror ignored the judge's instructions or became exposed to any outside influence from individuals or media sources. Because he failed in his burden of proof to show prejudice, we must find the trial court correctly rejected this conten-

tion of ineffective representation of counsel.

(C)

Schiro claims counsel did not present an adequate mitigation defense after the penalty phase conviction. The PCR court found Schiro failed to prove counsel's decision was unreasonable or prejudicial. The court's findings of fact noted significant mitigating evidence was presented in the guilty phase of the trial and was argued by counsel in the penalty phase. Schiro raised the insanity defense, thereby bringing into issue at the guilty phase all those matters of character, background, and history that normally are reserved for the

penalty phase. It is a defensible strategic decision to use all this evidence at the guilty phase to try to obtain an acquittal and not reintroduce all the same evidence at the penalty phase. The trial court was justified in finding counsel's performance in this area did not depart from reasonable norms of representation, and therefore no prejudice was shown.

(D)

Schiro also identifies seven issues he claims were preserved for appeal but not presented by appellate counsel. This issue of ineffective appellate representation was available for presentation in the original post-conviction petition and therfore is

waived in this petition. Lane, 521 N.E.2d at 949. Furthermore, appellate counsel need not raise on appeal an issue that in his professional judgment appears frivolous or unavailing.

Ingram v.State (1987), Ind., 508 N.E.2d 805, 808-809. Schiro cites no evidence from the record showing unreasonable professional judgment on these seven isues. He does not give the basis on which he concludes the matters include any reversible error; he does not state the basis for the motion to dismiss or to set aside the verdict, or any of the instructions at issue, or the basis for objection to the evidentiary rulings.

One of the issues involved a state's rebuttal witness, Linda Summerfield, who detailed an armed sexual assault which Schiro perpetrated against her. Schiro claims counsel should have more effectively cross-examined her and objected to an array of photos from which she picked him as her assailant. First, there is no showing as to what information might have been gained by further cross-examination of this witness, and second, Summerfield's testimony did no more than repeat one instance of as many as twenty-three instances of other unrelated sexual assaults Schiro committed which he himself related in a thirty-page statement.

(E)

Schiro also cites counsel's failure to respond to his family's assertion the psychiatric witness, Dr. Osanka, tried to "Shake him down" for an exra fee as a condition for the most favoerable tetimony. The trial judge found this story to be incredible. It rested on multiple hearsay as out-of-court declarations attributed by Schiro to his parents. The fact of this alleged "Shakedown" was not shwon in evidence and Schiro's parents never testified or told anyone else that this incident occurred.

(F)

Finally, Schiro claims counsel was deficient in not preventing jurors

from seeing him transported in shackles. It has been held that reasonable jurors can expect a criminal defendant to be in restraints during breaks and while being transported. Jenkins v. State (1986), Ind., 492 N.E.2d 666, 669. We have distinguished between a prisoner appearing in court in bonds or shackles as in Walker v. State (1980), 274 Ind. 224, 229, 410 N.E.2d 1190, 1193-1194, and when being transported and seen incidental to that. Sweet v. State (1986), Ind., 498 N.E.2d 924, 929, requires a showing or actual harm where jurors see a defendant being transported in restraints. The trial court was justified in finding Schiro

demonstrated no inadequacy in representation in any of these areas.

III

Schiro claims the aggravating circumstance of intentional killing could not be considered at the penalty phase because the felony murder as charged lacked the requisite element of mens rea in committing the underlying rape. He attempts to apply a fundamental double jeopardy rule that a confiction of a lesser included offsense is an accquital of the greater offense. An aggravating circumstance, however, is not an offense. A person convicted of either type of murder, that is, intentional killing under IC 35-42-1-1(1), or felony

murder IC 35-42-1-1(2), can be shown to contain the aggravator of intentional killing justifying the imposition of the death penalty. One can be found guilty of felong murder where the intention was to commit the underlying felony without necessarily intending to commit the murder. It does not follow, however, that one convicted of felony murder cannot be shown to have intentionally killed the victim while perpetrating the felony. IC 35-50-2-9 provides in pertinent part:

> (a) The State may seek a death sentence for murder by alleging, on a page separate from the rest of the rest of the charging instrument the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state

must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robberty. (emphasis added).

The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not

operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under I.C. 35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentionally killing and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to I.C. 35-50-2-9, and the jury determined that the aggravating circumstance existed in that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape

and criminal deviate conduct. In this same statute, § (9)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made his. There is therefore no error presented on this issue.

IV

Schiro claims that even if individually none of the above issues raise sufficient prejudice to require relief, cumulatively they do. Since we find no error on any of the issues above, no prejudicial error is preesented in their accumulation.

The trial court is affirmed.

Shepard, C.J., and Givan, J., concur.
DeBruler, J., dissents with separate opinion in which Dickson, J., concurs.

APPENDIX "B"

ORDER DENYING PETITION FOR POST-CONVICTION RELIEF

This Court held an evidentiary hearing on October 30, 1987, on issues raised by a Second Petition for Post-Conviction Relief filed by Messrs. Alex Voils and David Hennessy on behalf of the petitioner, Thomas N. Schiro. The Petitioner appeared in person and by his attorney, Alex Voils, and the State of Indiana appeared by Robert J. Pigman, Prosecuting Attorney of Vanderburgh County. Evidence was presented on said petition and arguments were presented to the court. At the conclusion of the hearing, the Court took the matters under advisement to review testimony and exhibits presented at the hearing. The Court has also reviewed the post-hearing briefs submitted by Petitioner and Respondent and the reply brief of the Petitioner.

History of Proceedings

On September 12, 1981, the Defendant was found guilty of the offense of murder while committing and attempting to commit the crime of rape under Count II of the charging information, and the

trial Court entered judgment of conviction on the verdict of the jury. On September 15, 1981, a hearing was held pursuant to the provisions of I.C. 35-50-2-9, at which the jury unanimously recommended that the death penalty not be imposed. The trial Court scheduled the cause for sentencing on October 2, 1981. At the sentencing hearing held on October 2, 1981, the trial Court overruled the recommendation of the jury and ordered that a sentence of death be imposed.

On appeal of the cause, the Indiana Supreme Court held that the original findings of the trial court did not set out clearly and properly the trial court's reasons for imposing the death penalty. The Supreme Court ordered the trial Court to make written findings in the case, setting out by nunc pro tunc entry the aggravating circumstances which were proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified by I.C. 35-50-2-9. The Petitioner was given an opportunity to contest the nunc pro tunc entry of the trial Court, and the State was given an opportunity to oppose the Petitioner's brief.

On February 22, 1983, the trial Court entered its pronoun-

cement of sentence, incorporating findings as directed by the Indiana Supreme Court, nunc pro tunc, as of October 2, 1981. The trial Court imposed a sentence of death and ordered that the Petitioner be executed.

On appeal, the Supreme Court of Indiana affirmed the decision of the trial court and remanded the case to the trial Court for the purpose of setting a date for the death sentence to be carried out. Schiro v. State, 451 N.E.2d 1047 (Ind.1983). The Supreme Court held, in part, that the Indiana death penalty statute is constitutional; that the trial Court did not err in imposing the death penalty; that it was not reversible error to omit certain verdict forms from consideration by the jury; that the nunc pro tunc findings made by the trial Judge were not improper and clearly set out the reasons the trial Court imposed the death penalty; that the Indiana death penalty statute permits a trial Judge to override a jury recommendation that death not be imposed; and that the death penalty was not arbitrarily or capriciously applied to the Petitioner.

On November 28, 1983, the United States Supreme Court denied

the Petitioner's writ of certiorari to vacate the death penalty. Schiro v. Indiana, 464 U.S. 1003, 104 S.Ct. 510. 78 L.Ed.2d 699 (1983).

On May 11, 1984, an Amended Petition for Post-Conviction Relief was filed by the Petitioner alleging denial of a fair trial at the sentencing stage of the proceedings because of partiality, bias and prejudice against the Petitioner on the part of the trial Judge.

On May 29, 1984, the Petitioner's Petition for Post-Conviction Relief was denied by Brown County Special Judge James M. Dixon.

The Petitioner appealed the denial of post-conviction relief to the Indiana Supreme Court. On June 28, 1985, that Court affirmed the trial Court's denial of relief. Schiro v. State, 479 N.E.2d 556 (Ind.1985).

On February 24, 1986, the United States Supreme Court denied the Petitioner's writ of certiorari to vacate the death sentence. Schiro v. Indiana, __ U.S. __, 106 S.Ct. 1247 (1986).

Thereafter, the Petitioner instituted a petition for writ of

habeas corpus in the United States District Court, Northern District of Indiana, South Bend Division, Judge Allen Sharp remanded to state court allowing the Petitioner to exhaust all available state remedies as required for federal habeas corpus proceedings. State remedies must be exhausted before federal habeas corpus can be sought. 28 U.S.C. Section 2254(b), Ex Parte Hawk, 321 U.S. 114 (1944).

On March 5, 1987, the Petitioner filed his Second Post-Conviction Relief Petition. The Petitioner filed a timely Motion for Change of Venue from the trial Court and this Court appeared, qualified and assumed jurisdiction on March 25, 1987.

On March 9, 1987, the State filed a Motion to Dismiss Petition for Post-Conviction Relief. This Court held a hearing in the Brown Circuit Court on the Motion to Dismiss on July 16, 1987. The Petitioner appeared in person and by his attorney, Alex Voils, and the State of Indiana appeared by Chris Lenn, Deputy Prosecuting Attorney of Vanderburgh County.

On July 31, 1987, this Court ruled on the State's Motion to Dismiss Petition for

Post-Conviction Relief. Issues 9(j) through 9(m) in the Petitioner's Second Post-Conviction Relief Petition were dismissed on the grounds of res judicata and prior adjudication. Issues raised and determined on appeal were not available as grounds for post-conviction relief and cannot be reviewed in post-conviction relief proceedings. Rule PC 1, Section 8, Cambridge v. State, 468 N.E.2d 1273 (Ind.1984).

Issues 8(a-c) and 9(a-i) were not dismissed and form the basis of the Petitioner's Second Post-Conviction Relief Petition. The State raised the defense of waiver for issues not previously raised. When the State raises a defense of waiver under Rule PC 1, Section 8, and the Petitioner has claimed inadequate appellate representation, the hearing judge is required to make a preliminary determination as to the competency of appellate counsel before reaching the otherwise waived ground for relief raised in the Post-Conviction Relief Petition. Davis v. State, 328 N.E.2d 768, 774 (Ind.1975).

Full hearing on the Petition for Post-Conviction Relief was scheduled for September 11, 1987.

Petitioner's counsel, Alex Voils, filed a Verified Motion for Continuance and the hearing was rescheduled for October 30, 1987. On that date, this Court held a hearing on the remaining issues of the Post-Conviction Relief Petition in the Brown Circuit Court.

As grounds for vacating, setting aside or correcting the conviction and sentence, the Petitioner alleges the following:

8(a). That previous post-conviction relief counsel was ineffective and inadequate for failing to raise the following grounds for reversal of the judgment of conviction and correction of sentence.

(b). That Defendant was denied effective assistance of counsel in preparing and presenting his defense and the appeal from the conviction.

(c). That Petitioner was denied due process of law, the equal protection of the laws and fundamental fairness and his constitutional rights thereof as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The general areas of allegations in support of the grounds set forth above are as follows:

1. That the cause was neither adequately investigated nor properly prepared for trial.

2. That the trial Court failed to sequester or adequately admonish the jury.

3. That trial counsel failed to present evidence at either the sentencing stage of the bifurcated trial or the sentencing hearing.

4. That issues, preserved at the request ofPetitioner in his Motion To Correct Errors, were waived on appeal.

5. That Petitioner was tried upon defective charging Informations and proceeded to the death penalty stage upon verdicts indicating a "nonintentional" killing.

6. That Petitioner was denied his right to confront the witnesses and evidence against him as applied to the testimony of Linda Gail Summerford and State's Exhibit 62.

7. That Petitioner was not provided, as an indigent, competent psychiatric assistance.

8. That members of the jury were allowed to view Defendant shackled during court recesses.

The primary focus of the Petitioner's argument is based on the eight general areas of allegations and the weave of ineffective assistance of counsel to each allegation individually. The Petitioner contends he was denied effective assistance of post-conviction counsel by their failure to present the trial counsel and appellate counsel's ineffective assistance of counsel to either the post-conviction trial Court or the applicable appellate tribunals. Petitioner asks that the Post-Conviction Relief Petition be granted and the matter set for retrial.

This Court makes specific findings of fact and conclusions of law on each allegation presented by the Petitioner as required by Indiana post-conviction relief procedures. Rule PC 1, Section 6, Robinson v. State, 493 N.E.2d 765, 766 (Ind.1986).

Allegation 1, The Cause was Neither Adequately Investigated Nor Properly Prepared for Trial.

Findings of Fact

The first allegation raised by the Petitioner states that the cause was neither adequately investigated nor properly prepared for trial. First, Petitioner contends that trial counsel did not request and did not receive a private investigator to aid in preparation of the cause for trial. Petitioner claims that an investigator would have physically traced the Petitioner's actions on the date of Laura Lubbenhusen's murder. Petitioner claims that an investigator would have found evidence of the consensual nature of Ms. Lubbenhusen's action by interviewing witnesses in an unnamed Evansville area bar and liquor store. Petitioner asserts that evidence of the consensual nature of the victim's actions should have been offered as a mitigating factor when considering the death penalty in the sentencing phase of the bifurcated trial. I.C. 35-30-2-5(C)(3).

Donald Campbell, a former Indianapolis police detective and experienced private investigator, testified that an investigation should have definitely been done in an effort to find witnesses who saw the Petitioner and victim together. In a recent investiga-

tion, Campbell was unable to find the bar, liquor store or witnesses. Petitioner could not remember and did not disclose the name of any bar or liquor store that he visited with the victim on the night of Laura Lubbenhusen's murder.

The second area of alleged inadequate investigation and preparation concerns the trial testimony of the Petitioner's former girlfriend, Mary T. Lee. Petitioner testified that Lee told him that the State had threatened Lee to either testify incriminating the Petitioner or she would lose her children to the authorities. Petitioner claims to have reported this incident to trial counsel who failed to investigate and cross-examine Lee about the threat. The trial Court found aggravating circumstances in Lee's testimony.

Detective Campbell testified that he was unable to locate Mary T. Lee in a recent investigation. Petitioner asserts that this is newly discovered evidence.

Conclusions of Law

In post-conviction proceedings, the Petitioner has the burden of establishing the grounds

for relief by a preponderance of the evidence. Rule P.C. 1, Section 5.

The trial judge in post-conviction proceedings isthe sole judge of the weight of the evidence and the credibility of the witnesses. Popplewell v. State, 428 N.E.2d 15, 16 (Ind.1981). This Court gives little weight to the credibility of Petitioner's testimony. The Petitioner has no motive to tell the truth and every motive to fabricate. Psychiatrists at the original trial testified that the Petitioner engages in manipulative and deceitful behavior. During testimony at the second post-conviction relief hearing, the Petitioner, on explaining on cross-examination why he failed to bring certain documents, stated under oath that he did not know why he was transported from X Block, death row, at Michigan City Prison to Brown County on October 30, 1987. From Petitioner's well-prepared testimony and notification from his attorney, it was apparent the Petitioner must have known he was transported for his second post-conviction relief hearing and not to see Brown County's fall foliage. Much of the Petitioner's allegations and

testimony were based on a totem pole of out-of-court statements by declarants not present to testify. For these reasons, this Court questions the reliability of Petitioner's testimony.

To prevail on a claim of ineffectiveness of counsel, Petitioner must prove that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Petitioner also must prove that counsel's failure to function was so prejudicial as to deprive him of a fair trial. A fair trial is denied when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result unreliable. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lawrence v. State, 464 N.E.2d 1291 (Ind.1984).

In meeting this burden, Petitioner must overcome by strong and convincing evidence a presumption that counsel has prepared and executed his client's defense effectively. Williams v. State, 508 N.E.2d 1264 (Ind.1987).

A determination of ineffectiveness of counsel is factually oriented. This Court will not speculate about what may have been

the most advantageous strategy and isolated bad tactics or inexperience does not necessarily amount to ineffective assistance of counsel. Mato v. State, 478 N.E.2d 57 (Ind.1985); McChristian v. State, 511 N.E.2d 297 (Ind.1987).

Judicial scrutiny of counsel performance is highly deferential and should not be exercised through the distortion of hindsight. Nadir v. State, 505 N.E.2d 440 (Ind.1987).

The Petitioner failed to demonstrate ineffective assistance of counsel by inadequate investigation and improper preparation for trial. The Petitioner failed to meet either prong of the Strickland v. Washington test by a preponderance of the evidence.

Appellate and trial counsel's representation did not fall below prevailing professional norms and Petitioner was not deprived of a fair trial by the omission of evidence of the consensual nature of the victim's action during the sentencing state of trial. The Petitioner's claims of visits to a bar or liquor store with a consenting Laura Lubbenhusen were sketchy. The physical evidence at the scene of

the crime and the victim's strong aversion toward men make it understandable why trial counsel chose not to use consent as a mitigating factor and why appellate counsel did not pursue this issue.

Trial counsel's failure to investigate the allegations of coercion against Mary T. Lee and appellate counsel's decision not to pursue this issue did not constitute ineffective assistance of counsel. The alleged coercion rests entirely on the questioned credibility of the Petitioner. Much of Lee's testimony was beneficial to the Petitioner. It is plain why counsel did not follow up the unsubstantiated accusation of coercion made against the Vanderburgh County Prosecutor's Office.

Allegation 2, the Trial Court Failed to Sequester or Adequately Admonish the Jury.

Findings of Fact

Petitioner testified that he indicated to counsel that he wanted a sequestered jury. Petitioner further testified that his counsel told him there was no

need to have a sequestered jury. The record does not indicate that Petitioner made such a request and no evidence exists to dispute Petitioner's claim that he requested a sequestered jury.

Georgia Kay Brown, an Indianapolis private investigator, gathered newspaper articles concerning the Petitioner's trial available in Brown County. The media accounts of the trial from the Columbus Republic and Bloomington Herald-Telephone were admitted into evidence. Brown testified she could not locate five of the 12 jurors. None of the jurors were present at the second post-conviction relief hearing. Petitioner further contends that the jury was not properly or adequately admonished by the trial Judge.

Conclusions of Law

If requested in a timely fashion, the Defendant has an unequivocal right in a capital case to have the jury sequestered. Lowery v. State, 434 N.E.2d 868 (Ind.1982).

The decision not to move for jury sequestration in a capital case does not by itself constitute ineffective assistance of counsel.

The decision not to request sequestration of the jury is strategic. Counsel is under no duty to request sequestration in a capital case. The Petitioner must show prejudice by the failure to move for jury sequestration. Burris v. State, 465 N.E.2d 171 (Ind.1974).

The Petitioner has failed to rebut the presumption of competence on the failure of counsel to request sequestration of the jury. There was no showing by a preponderance of the evidence that the failure to request the sequester of the jury had any affect on the fairness of the Petitioner's trial.

The trial Judge adequately and properly admonished the jury on at least seven occasions.

Allegation 3, Trial Counsel Failed to Present Evidence at Either the Sentencing Stage of the Bifurcated Trial or the Sentencing Hearing.

Findings of Fact

Petitioner asserts that counsel presented no evidence of mitigating circumstances at the sentencing stage of the bifurcated trial or the sentencing hearing.

Petitioner testified that he asked counsel to allow his parents to present mitigating factors. Petitioner claims that counsel failed to include the victim's consensual actions as a mitigating factor.

Conclusions of Law

The Petitioner failed to overcome the presumption of effective assistance of counsel by a preponderance of the evidence.

Trial counsel incorporated mitigating factors admitted into evidence during trial at the sentencing stage of the bifurcated trial. Trial counsel filed objections to the presentence report and moved to correct the report by including mitigating circumstances. Trial counsel presented mitigating circumstances during trial through the testimony of two psychiatrists, the cross-examination of Petitioner's former girlfriend, Mary T. Lee, the testimony of Petitioner's father, the social, cultural, educational, religious background of the Petitioner, his alcohol and drug addiction, the Petitioner's age, the Petitioner's attempts at rehabilitation and Petitioner's emotional and behavioral problems. Trial counsel's presentation of

mitigating factors was adequate and professionally reasonable. Petitioner fails to meet the Strickland v. Washington standard on this allegation.

Allegation 4, Issues Preserved at the Request of Petitioner in his Motion to Correct Errors were Waived on Appeal.

Findings of Fact

Petitioner testified that seven issues preserved at his request in the Motion to Correct Errors were waived by appellate counsel and his first post-conviction relief counsel without his knowledge. Those issues include:

1. The Court erred in overruling and denying the Defendant's motion to dismiss.

2. The Court erred in overruling the Defendant's objection to the admission into evidence of State's Exhibit 47, a coat recovered from the Half-Way House.

3. The Court erred in sustaining the State's objection to the admission into evidence of Defendant's Exhibit B.

4. The Court erred in giving to the jury the Court's preliminary instruction concerning the burden of proof on the issue of insanity, which instruction was not numbered.

5. The Court erred in giving to the jury the Court's final instructions numbered 3, 9, 11 and 15.

6. The Court erred in modifying the Defendant's tendered instruction numbered 15.

7. The Court erred in overruling and denying the Defendant's motion to reject the verdict and reinstruct the jury.

Conclusions of Law

The decision of appellate counsel not to pursue certain issues preserved by the Motion to Correct Errors was strategic and tactical. This Court will not second guess appellate counsel's decision to omit and waive certain appealable issues. When incompetency of counsel is alleged, there is a strong presumption of adequate legal assistance. Whitlock v. State, 456 N.E.2d 717, 718 (Ind.1983). The Petitioner has not overcome this

presumption by a preponderance of the evidence. The Petitioner has not met the performance or prejudice prong of the Strickland v. Washington test on this allegation.

Allegation 5, Petitioner was Tried Upon Defective Charging Informations and Proceeded to the Death Penalty Stage Upon Verdicts Indicating a "Non-Intentional" Killing.

Findings of Fact

Petitioner claims that he was convicted upon a defective charging Information where no mens rea was alleged. The Defendant was convicted under Count II, Murder, I.C. 35-42-1-1(2). Petitioner claims that he was not charged or found guilty of intentionally killing the victim and therefore does not fit the aggravating factor of Indiana's death penalty statute. Petitioner contends that trial counsel was ineffective for allowing the defective Information to proceed to trial.

Conclusions of Law

Petitioner claims the charging Information filed was defective. Omitting captions and

formal parts, Count II of the Information reads as follows:

> Thomas N. Schiro on or about February 5, 1981, did kill Laura Luebbehusen by beating, striking and strangling the said Laura Leubbehusen, thereby causing her to die by asphyxiation, while the said Thomas N. Schiro was committing and attempting to commit the crime of rape, to-wit: knowingly and by the use of force and the threat of force, having sexual intercourse with the said Laura Luebbehusen, a member of the opposite sex, without the consent of the said Laura Leubbehusen, all in violation of I.C. 35-42-1-1(2).

An Information must state the crime in words of the statute or words that convey a similar meaning. Burris v. State, 465 N.E.2d 171, 181 (Ind.1984).

The language of the Information was sufficiently certain to enable the accused, the trial Court and the jury to determine the crime for which conviction was sought.

Indiana's death penalty statute is in part at I.C. 35-50-2-9:

Death Sentences - (a) The State may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reaonable doubt the existence of at least one (1) of the aggravating circumstances alleged. (b) The aggravating circumstances are as follows: (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery.

The State filed a separate request for the death penalty which specifically identified the aggravating circumstances.

The crime of Murder, as charged in Count II of the Information filed herein, was committed by the defendant, Thomas N. Schiro, and the

following aggravating circumstances exist, which justify the imposition of the death sentence.

(1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information, constituting an aggravating circumstance justifying imposition of the death penalty, as set forth in I.C. 35-50-2-9(b)(1).

WHEREFORE, the State of Indiana prays that the penalty of death be imposed on the defendant, Thomas N. Schiro.

The language of the Information was sufficiently certain to enable the accused, the trial Court and the jury to determine the aggravating circumstances of the death penalty statute.

The Petitioner was convicted for felony murder. The intent to kill is not an element of felony murder. Pawloski v. State, 380 N.E.2d 1230 (Ind.1978). The only intent required to be proved in a

prosecution for felony murder is the intent to commit the underlying felony. Brown v. State, 448 N.E.2d 10 (Ind.1983).

The intent for the underlying felony of rape was adequately alleged in the Information and proved. The Information alleging the death penalty was adequate adn satisfied the requirement of intentionally.

The Court finds no ineffective assistance of counsel under this allegation.

Allegation 6, Petitioner was Denied His Right to Confront the Witnesses and Evidence Against Him as Applied to the Testimony of Linda Gail Summerford and State's Exhibit 62.

Findings of Fact

Petitioner claims that trial counsel's failure to cross-examine Linda Gail Summerford and dispute State's Exhibit 62 were extremely prejudicial to him. Linda Gail Summerford, a surprise State witness, testified that the Petitioner committed an uncharged rape on her. State's Exhibit 62 was a photo array Summerford used

to identify Petitioner as the man who raped her. The Petitioner's rape of Summerford was considered an aggravating circumstance by the trial Judge in imposing the death penalty over the jury's recommendation.

Conclusions of Law

The decision not to cross-examine Summerford and contest the photographic array was tactical. Petitioner has not overcome the presumption that counsel prepared and executed Petitioner's defense effectively by a preponderance of the evidence. This Court will not speculate on what should have been the defense's proper strategy. A fair trial was not denied the Petitioner by this tactical decision. Prior to Summerford's testimony, Dr. Osanka testified that the Defendant committed as many as 23 acts of rape. The decision not to challenge Summerford did not meet the Strickland v. Washington standards for ineffective assistance of counsel.

Allegation 7, Petitioner was Not Provided as an Indigent, Competent Psychiatric Assistance.

Findings of Fact

Petitioner filed a request to have a psychiatric expert appointed to aid in the preparation and presentation of his defense. This request was denied. A psychiatrist, Dr. Osanka, was hired and paid for by Petitioner's parents.

Dr. Osanka was instrumental in the preparation of Petitioner's defense. Petitioner claims that Dr. Osanka indicated to Petitioner and his family that a sizable sum of money would have to be paid to the psychiatrist for testimony favorable to the Petitioner. Trial counsel was informed about this attempted bribe but did nothing about it according to the Petitioner.

Conclusions of Law

Two psychiatrists were appointed as Court's witnesses to examine the Defendant and testify at trial. The Petitioner was provided adequate and competent psychiatric assistance for his insanity defense. Contrary to what the Petitioner suggested in his post-conviction relief testimony, competent psychiatric assistance does not mean that expert evaluatoins and opinions must be rendered in the defendant's favor.

The alleged shakedown or blackmail by Dr. Osanka is based completely on the questioned credibility of the Petitioner. The Petitioner's testimony was based on layers of out-of-court statements by declarants not present to testify. Petitioner's parents were not called to corroborate the alleged shakedown.

This Court finds that the Petitioner was not denied competent psychiatric assistance and was not denied effective assistance of counsel on this allegation.

Allegation 8, Members of the Jury were Allowed to View

Defendant Shackled During Court Recesses.

Findings of Fact

Petitioner claims to be prejudiced by being viewed in manacles and shackles by the jury on breaks in the proceedings and when being led in or out of the trial courtroom. Trial counsel was aware that the Petitioner was being viewed in shackles by the jury and made no objections. Petitioner complained to counsel about being seen by the jury in shackles.

Conclusions of Law

The fact that a defendant has been seen by jurors while being transported in handcuffs is not a basis for reversal, absent a showing of actual harm. Hart-lerod v. State, 470 N.E.2d 716 (Ind.1984). Reasonable jurors could expect the Petitioner to be in police custody while in the hallway of the courthouse. Jenkins v. State, 492 N.E.2d 666 (Ind.1986). A reasonable jury could assume that the Petitioner would be in police custody and under custodial restraint during breaks in the trial and traveling to and from the courtroom. The

Petitioner has made no showing of actual harm and has not met the Strickland v. Washington standard for ineffective assistance of counsel on this allegation.

Judgment of the Court

IT IS NOW ORDERED by the Court that any finding of fact in this order more properly considered as a conclusion of law shall be considered to have been restated as such. Any conclusion of law more properly considered to be a finding of fact shall be considered to have been restated as such.

IT IS FURTHER ORDERED by the Court that the Second Petition for Post-Conviction Relief filed by the Petitioner, Thomas N. Schiro, on March 5, 1987, be denied on all grounds.

SO ORDERED this _____ day of January, 1988.

S/
JOHN G. BAKER, SPECIAL JUDGE
Brown Circuit Court

Defendant filed his Motion To Correct Correct Errors with Memoranda

APPENDIX "C"

IN THE

SUPREME COURT OF INDIANA

NO. 07S00-8807-PC-656

THOMAS N. SCHIRO,

Appellant (Defendant below)

v.

STATE OF INDIANA,

Appellee (Plaintiff below)

Supreme Court of Indiana

NOTICE OF APPEAL

Comes now Appellee, by counsel, and notifies the Court of its intention to petition the Supreme Court of the United States for a Writ of

Certiorari. Further, Appellee would request the Clerk of the Court to certify and transmit the record herein to the Supreme Court of the United States.

Respectfully submitted,

Alex R. Voils, Jr.
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was duly served upon the Attorney General's Office, 219 State House, Indianapolis, IN 46204, by first-class mail, this 10th day of April, 1989.

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Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5327

IN THE

Supreme Court of the United States

October Term, 1989

THOMAS N. SCHIRO,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

1. Whether the Indiana Supreme Court is competent to determine the effect, if any, of a jury's silence on one count of a capital prosecution upon the sentence for another count.

2. Whether the jury's silence on one count of a capital prosecution operates as an acquittal of any elements of such count that are also elements of aggravating factors under a State's death penalty statute.

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REASON WHY THE WRIT SHOULD NOT ISSUE: THIS CASE DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION

This is the third time this case has come before this Court. Petitioner's conviction and sentence of death was affirmed by the Indiana Supreme Court, *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983), *cert. denied*, 464 U.S. 1003. Petitioner then sought post-conviction relief which was denied, *Schiro v. State*, 479

N.E.2d 556 (Ind. 1985), *cert. denied*, 475 U.S. 1036. The instant petition for writ of certiorari arises from the denial of Petitioner's second attempt to obtain post-conviction relief. The opinion of the Indiana Supreme Court, reproduced in the Appendix to Petitioner's Brief, is reported as *Schiro v. State*, 533 N.E.2d 1201 (Ind. 1989).

Petitioner was charged with the murder of one Laura Luebbehusen. Three counts were brought: (1) murder; (2) murder committed while committing or attempting to commit rape; (3) murder committed while committing or attempting to commit criminal deviate conduct. The jury found petitioner guilty of murder while committing or attempting to commit rape and returned no verdict on the other two counts. After the penalty phase, the jury recommended against the death penalty, but the trial judge overrode the jury's recommendation and sentenced Petitioner to death.

Petitioner's argument is essentially that the jury's silence on the charge of murder (as opposed to the guilty verdict on the felony murder/rape charge) operates as an acquittal on that charge. Since one of the elements of murder under IND. CODE § 35-42-1-1(1) is a knowing state of mind, Petitioner reasons that the silent verdict operates as a finding that he did not possess the *mens rea* requisite to that offense. And since the aggravating circumstance the State charged in its death penalty allegation under IND. CODE § 35-50-2-9(b)(1) was the *intentional* killing of the victim while committing rape, Petitioner concludes that, lacking the "knowing" *mens rea* required for murder, he cannot be found to have possessed the "intentional" *mens rea* required for imposition of the death penalty. As authority for his position he relies on *Bullington v. Missouri*, 451 U.S. 430 (1981).

Petitioner's argument is incorrect for two reasons: (1) the Indiana Supreme Court has already determined that the jury's silence on murder did not operate as an acquittal on that count; and (2) even if it did, it did not operate as a finding that the

underlying elements were nonexistent so as to preclude the imposition of the death penalty.

It is true, of course, as Justice DeBruler of the Indiana Supreme Court pointed out in his dissent, that usually in Indiana the jury's silence on one count is the equivalent of an acquittal on that count. *Buckner v. State*, 248 N.E.2d 348 (Ind. 1969); *Smith v. State*, 99 N.E.2d 417 (Ind. 1951). There is, however, an exception to this rule. The rule does not apply where the multiple counts are "merely different charges of the same offenses." *Cichos v. State*, 208 N.E.2d 685 (Ind. 1965). The dissent in the instant case attempted to distinguish *Cichos*, but the majority was not persuaded. Noting the inapplicability of the rule which holds that conviction of a lesser included offense constitutes an acquittal of the greater offense, the majority opinion stated that:

> The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, *it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider.* 533 N.E.2d at 1208 (emphasis supplied).

Thus the Indiana Supreme Court has determined that the jury's silence on the murder count cannot be taken as a finding that the elements of that count did not exist. Determining the effect of a jury's silence in a state court system is clearly a determination of state law, and the Indiana Supreme Court's determination of this question constitutes an independent state ground not subject to review in this Court. Necessarily, therefore, the jurisdiction of this Court fails. *Michigan v. Long*, 463 U.S. 1032, 1038 fn.4 (1983); *Fox Film Corporation v. Miller*, 296 U.S. 207 (1935). Petitioner's argument depends upon the assumption that the jury's silence operated as an acquittal; since that question has been determined adversely to Petitioner by the highest court competent to do so, his argument evaporates, and no federal question is presented to this Court.

Petitioner's argument would fail, moreover, even if the jury's silence on the murder charge were deemed to operate as an acquittal of that charge. His reliance on *Bullington*, *supra*, is misplaced. In *Bullington*, the Missouri jury had the choice of imposing either death or life imprisonment and chose life imprisonment. Upon retrial (after reversal on grounds not relevant here), the prosecution indicated an intention to seek the death penalty a second time. This Court held that the jury's decision in the first trial constituted an acquittal for insufficiency of evidence of whatever was necessary to impose the death penalty, that is, it was a finding that the State had failed to prove its case. A retrial of the death penalty was therefore barred by the double jeopardy clause.

This case is not comparable to *Bullington*. In *Bullington*, the ultimate responsibility for the death penalty decision lay with the jury; the Missouri statute provided that "The judge shall impose the sentence fixed by the jury." 451 U.S. at 433, fn.4. (In Indiana, the jury's determination on penalty is advisory; the judge can override it). The jury decision set up as a double jeopardy bar to a future attempt to obtain the death penalty was in fact a decision on the very death penalty count which the State sought to retry. The jury decision which Petitioner attempts in the instant case to set up as a bar to the death penalty is not a decision on the death penalty, but a decision on a count other than the one upon which he was convicted. His argument is really that acquittal on the other count is logically inconsistent with the finding of the aggravating circumstance necessary to impose the death penalty for the count upon which he was convicted. Thus this case is really an "inconsistent verdict" case with a twist: instead of arguing that acquittal on Count I is inconsistent with guilt on Count II, Petitioner argues that acquittal on Count I is inconsistent with the imposition of the death penalty on Count II. The argument is unconvincing.

In *United States v. Powell*, 469 U.S. 57 (1984), a case dealing with allegedly inconsistent jury verdicts, this Court stated

that "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. . . . This review should be independent of the jury's determination that evidence on another count was insufficient." 469 U.S. at 67. *Bullington* depended on the notion that the jury's rejection of the death penalty constituted a finding that there was insufficient evidence to prove the State's claim on the death penalty issue. Under *Powell*, *supra*, an acquittal on Count I herein is irrelevant to a sufficiency review of conviction on Count II. There is no reason why it should not also be irrelevant to a sufficiency review of the penalty imposed under Count II. "Respondent is given the benefit of her acquittal on the counts on which she was acquitted, and it is neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted." *Powell*, *supra*, at 369 U.S. 69. The State would simply add that the burden of conviction includes the possible penalties, and in the instant case includes the death penalty.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

THOMAS A. SCHIRO *v.* INDIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 89–5327. Decided October 10, 1989

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

There is a critical difference between a judgment of affirmance and an order denying a petition for a writ of certiorari. The former determines the rights of the parties; the latter expresses no opinion on the merits of the case.[1] Partly for that reason, and partly because our certiorari docket is so

[1] "Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

"The one thing that can be said with certainty about the Court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland. The issues canvassed in the opinions of that court, and which the State of Maryland has asked us to review, are of a nature which very readily lend themselves to misconstruction of the denial of this petition. The present instance is peculiarly one where the redundant become the necessary." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of certiorari).

crowded, the Court does not explain its reasons for entering such orders. There is, accordingly, a danger that an individual Justice's statement of his or her views respecting the denial of certiorari may be misleading or counterproductive.[2] Nevertheless, I am persuaded that a brief comment on this troublesome and unusual case is appropriate.

This is a capital case. It is one of 63 such cases that were considered at our Conference during the week of September 25, 1989. Despite the contrary views that were once expressed,[3] it is neither feasible nor wise for this Court to review the merits of every capital case in which the petitioner asks us to review the decision of a State's highest court. In many of these cases review of the federal constitutional issues is more effectively administered in federal habeas corpus proceedings.[4] The burdens associated with the delay in the date of execution are more than offset by the benefit of complete and adequate review of the decision to impose a death sentence.

In this case, despite the fact that petitioner was convicted of felony murder and sentenced to death in 1981, the Federal District Court has not yet had an opportunity to review his federal constitutional claims.[5] The Indiana Supreme Court has, however, considered the validity of the death sentence on four different occasions. First, while the case was pending on direct review, the court unanimously granted *the State's* petition to remand the case to the trial judge to enable him to make the findings of fact that the Indiana statute re-

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[2] See *Singleton* v. *Commissioner*, 439 U. S. 940, 945–946 (1978) (opinion of STEVENS, J., respecting denial of certiorari).

[3] See *Coleman* v. *Balkcom*, 451 U. S. 949, 956–964 (1981) (REHNQUIST, J., dissenting from denial of certiorari).

[4] *E. g.*, *Watkins* v. *Virginia*, 475 U. S. 1099, 1100 (1986) (opinion of STEVENS, J., respecting denial of certiorari).

[5] In 1986 the petitioner did file an application for a writ of habeas corpus but the parties have advised that it was "remanded" to the state court because petitioner's state remedies had not yet been completely exhausted. See *Rose* v. *Lundy*, 455 U. S. 509 (1982).

quires to support a death sentence. Second, in 1983, after the trial judge entered his findings *nunc pro tunc*, a bare majority of the court affirmed the sentence and held that the findings were adequate to support the judge's decision to override the unanimous recommendation of the jury that the death penalty should not be imposed.[6] Third, in 1985, a bare majority of the court affirmed the denial of post-conviction relief, rejecting the claim that the trial judge violated the Due Process Clause by relying in imposing the death sentence on personal observations of petitioner's conduct not previously disclosed to counsel.[7] Fourth, again by a bare majority, the Indiana Supreme Court rejected the

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[6] See *Schiro* v. *State*, 451 N. E. 2d 1047 (1983). Ironically, although the trial judge refused to follow the jury's recommendation of life at the penalty phase, he apparently found its rejection of the insanity defense, at the guilt stage, dispositive on the sole aggravating factor that petitioner committed the murder intentionally. He explained that the sentence was supported by the petitioner's conviction of felony murder and the fact that "[t]he jury rejected the plea of insanity by its verdict," further stating that since there was an aggravating circumstance and no mitigating circumstances to outweigh it, "the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law." *Id.*, at 1066–1067. One of the dissenting justices wrote:

"Under the evidence, Defendant could have been found guilty of the crime charged whether he killed Laura Luebbehusen *intentionally* or knowingly or merely accidentally while committing or attempting to commit a rape. He was subject to the death penalty, however, only if he killed her *intentionally*. The interposition and rejection of the defense of insanity (mental disease or defect) Ind. Code § 35–41–3–6 (Burns 1979) simply has no relevance to the issue of whether or not the killing was done intentionally; yet, it is obvious that the trial court judge regarded it as significant, if not in fact controlling." *Id.*, at 1068 (Prentice, J., concurring and dissenting).

[7] See *Schiro* v. *State*, 479 N. E. 2d 556 (1985). In dissenting from the denial of certiorari, two Members of this Court expressed the opinion that the judge's rejection of the jury recommendation of no death sentence was inconsistent with the Court's holding in *Spaziano* v. *Florida*, 468 U. S. 447 (1984). See *Schiro* v. *Indiana*, 475 U. S. 1036 (1986) (MARSHALL, J., joined by BRENNAN, J., dissenting from denial of certiorari).

claim that is asserted in the certiorari petition the Court has denied today.[8]

Petitioner claims that the imposition of a death sentence on the basis of the trial judge's finding that he intended to kill his victim, made after the jury had rejected the charge of intentional murder and had unanimously refused to recommend death, violates the Double Jeopardy Clause. It is undisputed that the trial judge's finding that petitioner intended to kill his victim is an essential predicate for the death penalty. Under Indiana law, that finding had to be made beyond a reasonable doubt. Ind. Code Ann. §35–50–2–9 (1985). Yet, the jury twice indicated that it did not believe that the murder was intentional. First, the jury apparently rejected the prosecutor's contention, at the guilt stage, that petitioner committed the murder knowingly. Petitioner was charged with murder in the knowing killing of the victim in Count I and with felony murder in Count II; although the jury convicted him of the latter, it implicitly acquitted him of the knowing state of mind necessary to support a conviction on Count I. Second, after the prosecutor had again argued to the jury that the murder was intentional, the jury unanimously refused to recommend the death penalty. Petitioner's claim was rejected as a matter of state law by the Indiana Supreme Court, which held that the jury's refusal to convict on Count I was not an acquittal of the elements of the offense charged in that Count. That holding might well be sufficient reason to deny review of a case arising from a state collateral proceeding. Nonetheless, petitioner's claim has a federal dimension that demands fresh analysis when it is first considered on its merits in a federal court.[9]

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[8] See 533 N. E. 2d 1201 (1989).

[9] "As our opinions have made clear, no higher duty exists in the judging process than to exercise meticulous care where the sentence may be, or is, death." Address of Justice Powell, Eleventh Circuit Conference, May 8–10, 1988. See also Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report

It cannot be disputed that petitioner was placed in jeopardy within the meaning of the Fifth Amendment to the Federal Constitution when the trial on Count I commenced. See *Crist* v. *Bretz*, 437 U. S. 28 (1978). The fact that Indiana may not consider the jury's silence an "acquittal" as a matter of state law surely does not determine the constitutional question whether he could again be placed in jeopardy on the same charge. Cf. *Price* v. *Georgia*, 398 U. S. 323 (1970). Nor does it determine whether the action by the jury—especially when illuminated by its unanimous decision at the penalty hearing—should be given preclusive effect either under the principles of double jeopardy in capital cases enunciated in *Bullington* v. *Missouri*, 451 U. S. 430 (1981), or under more general principles of collateral estoppel. See *Simpson* v. *Florida*, 403 U. S. 384 (1971); *Ashe* v. *Swenson*, 397 U. S. 436 (1970). These, as well as the other federal questions that petitioner has raised in the state courts, are open to and will presumably receive careful consideration from the federal court with habeas corpus jurisdiction over the case."

The long delay that has occurred in this case is a matter of public concern and a matter that is relevant to any consideration of the efficacy of capital punishment. The State's dubious procedural scheme that allows a judge to override a jury's appraisal of the seriousness of a capital defendant's crime has resulted in eight years of litigation. Those years of litigation, and the costs that they have imposed on lawyers, judges and court administrators, have not furthered any societal interest in incapacitation: since petitioner has been incarcerated continuously from the date of his trial, he has presented no greater threat to the community than if he had been executed promptly after the trial was completed.

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and Proposal 5 (Aug. 23, 1989) ("The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review").

"Cf. *Ashe* v. *Swenson*, 397 U. S., at 437, n. 1 (applying *Benton* v. *Maryland*, 395 U. S. 784 (1969), retroactively to cases on federal habeas).

Nor, since juries presumably represent a fair cross-section of the community, has the cost served any compelling interest in satisfying an outraged community's desire for revenge or retribution. The delay, however, is manifestly not relevant to, and should have no impact on, petitioner's entitlement to consideration of his substantial federal claims by the federal courts.